



6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 The Grand Canyon Trust,  
10 Plaintiff,

11 vs.

12 Tucson Electric Power Company,  
13 Defendant.  
14  
15

PCT  
No. CIV 01-2189-PHX-EHC  
**ORDER**

16 Pending before the Court are Plaintiff's Motions for Partial Summary Judgment on  
17 (1) the Issue of Standing [Dkt. 55]; (2) its Second Cause of Action [Dkt. 56]; and (3) on its  
18 Third Cause of Action [Dkt. 58]. Also pending before the Court are Defendant's Motions  
19 for Summary Judgment on (1) the Basis of Laches [Dkt. 60]; (2) Plaintiff's Second Cause  
20 of Action [Dkt. 62]; (3) Plaintiff's Third Cause of Action; (4) Plaintiff's Second Cause and  
21 Third Cause of Action on Statute of Limitations and "Fair Notice" Grounds [Dkts. 67-1, 67-  
22 2]. All of these motions have been fully briefed and are therefore ready for the Court's  
23 review.

24 **I. Background and Procedural History**

25 On December 21, 1977, the Environmental Protection Agency ("EPA") issued  
26 Defendant a permit to build two coal powered electricity generating facilities ("Springerville  
27 Plant") pursuant to the Clean Air Act of 1970 and the Prevention of Serious Deterioration  
28 Program of 1975 ("1975 Rules"). [Dkt. 11]. These Rules provided for revocation of the

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1 permit if construction was not commenced within eighteen months or was discontinued for  
2 at least eighteen months. 40 C.F.R. § 52.21(e)(3) (1975). In June of 1978, the EPA  
3 promulgated new deterioration standards ("1978 Rules") as a result of amendments to the  
4 Clean Air Act. [Dkt. 11]. The 1978 Rules allowed for projects with permits issued under the  
5 1975 Rules to be exempt from increased standards of the 1978 Rules as long as they had  
6 "commenced construction" by March 19, 1979, did "not discontinue construction" for more  
7 than eighteen months, and "completed construction within a reasonable" amount of time. 40  
8 C.F.R. § 52.21(i)(2)(ii)-(iii) (1978).

9 Incorporated in 1985, Plaintiff is a "regional conservation organization dedicated to  
10 conserving the natural resources of the Colorado Plateau." [Dkt. 28, p. 3, ¶ 7]. On November  
11 9, 2001, Plaintiff filed a Complaint on behalf of its members, alleging injury of the following  
12 interests: "(1) breathing air in the Little Colorado River airshed and surrounding areas free  
13 from [D]efendant's excessive pollutant discharges, (2) viewing natural scenery and wildlife  
14 unimpaired by an ugly haze caused, in whole or in part, by [D]efendant's discharges, and (3)  
15 protecting the natural ecology of the region from air pollution related impacts." [Dkt. 1, p.  
16 3, ¶ 6; Dkt. 28, p. 3, ¶ 8].

17 Plaintiff asserts three causes of action in its First Amended Complaint: (1)  
18 Construction and Operation After Regulatory Deadline of March 19, 1979; (2) Construction  
19 and Operation After Expiration of Permit; and (3) Operation of Springerville [Plant] in  
20 Violation of NSPS Limits. [Dkt. 28]. In its Order granting Defendant's Motion for Summary  
21 Judgment, the Court found that Defendant had commenced construction pursuant to the 1978  
22 Rules before March 19, 1979. [Dkt. 43].

## 23 **II. Standard of Review**

24 Summary judgment is proper "only if no genuine issues of material fact remain for  
25 trial and the moving party is entitled to judgment as a matter of law." Block v. City of Los  
26 Angeles, 253 F.3d 410, 416 (9<sup>th</sup> Cir. 2001). The Court must view evidence in a light most  
27 favorable to the nonmoving party. Id.

1 **III. Plaintiff's Motion for Partial Summary Judgment on Issue of Standing**

2 In order to establish standing, a plaintiff must show "(1) it has suffered an 'injury in  
3 fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or  
4 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and  
5 (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a  
6 favorable decision." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC),  
7 Inc., 528 U.S. 167, 180, 120 S. Ct. 693, 704 (2000).

8 **A. Injury in Fact**

9 The Ninth Circuit has held that "environmental and aesthetic injuries constitute  
10 injuries in fact for standing purposes." Desert Citizens Against Pollution v. Bisson, 231 F.3d  
11 1172, 1176 (9<sup>th</sup> Cir. 2000). The Supreme Court and the Ninth Circuit have found standing  
12 based on allegations that a party's activities have been restricted due to concerns about  
13 pollution. See Laidlaw, 528 U.S. at 181-83, 120 S. Ct. at 704-05; Hall v. Norton, 266 F.3d  
14 969, 976 (9<sup>th</sup> Cir. 2001); NRDC v. S.W. Marine, Inc., 236 F.3d 985, 994 (9<sup>th</sup> Cir. 2000), cert.  
15 denied, 533 U.S. 902, 121 S. Ct. 2242 (2001); Ecological Rights Foundation v. Pacific  
16 Lumber Co., 230 F.3d 1141, 1149 (9<sup>th</sup> Cir. 2000).

17 Because Plaintiff is comprised of members alleging their activities have been curtailed  
18 due to health concerns regarding pollution and the aesthetic impact visible in the environment  
19 surrounding the Springerville Plant [Dkt. 55, pp. 7-12], Plaintiff has satisfied the "injury in  
20 fact" requirement.

21 **B. Fairly Traceable**

22 In his declaration and report, Plaintiff's expert, Dr. Jefferson R. Snider, makes a direct  
23 link between the emissions from the Springerville Plant and the alleged injuries suffered by  
24 Plaintiff's members. [Dkt. 55, pp. 13-14]. Plaintiff has therefore satisfied the "fairly  
25 traceable" requirement.

1           **C. Redressability**

2           An injunction to discontinue excess pollution is sufficient to satisfy the redressability  
3 requirement, even if that injunction does not stop all pollution. Texans United for a Safe  
4 Economy v. Crown Central Petroleum Corp., 207 F.3d 789, 792-94 (5<sup>th</sup> Cir. 2000); Center  
5 for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143, 1156 (N.D. Cal. 2002). The  
6 Supreme Court has held “a sanction that effectively abates the conduct and prevents its  
7 recurrence provides a form of redress. Civil penalties can fit that description.” Laidlaw, 528  
8 U.S. at 185-86, 120 S. Ct. at 706.

9           Because Plaintiff seeks (1) declaratory and injunctive relief that would require  
10 Defendant to install technology to control its emissions, and (2) civil penalties, Plaintiff has  
11 satisfied the redressability requirement.

12           Plaintiff has satisfied all three requirements to establish standing, and the Court will  
13 therefore grant Plaintiff’s Motion for Partial Summary Judgment on the Issue of Standing.

14           **IV. Defendant’s Motion for Summary Judgment on the Basis of Laches**

15           “To demonstrate laches, a party must establish (1) lack of diligence by the party  
16 against whom the defense is asserted, and (2) prejudice to the party asserting the defense.”  
17 Apache Survival Coalition v. U.S., 21 F.3d 895, 905 (9<sup>th</sup> Cir. 1994) (citations and internal  
18 quotation marks omitted). Moreover, “[l]aches must be invoked sparingly’ in suits brought  
19 to vindicate the public interest.” Id. (citations omitted).

20           **A. Lack of Diligence**

21           The EPA issued the permit allowing Defendant to construct the Springerville Plant  
22 in 1977. [Dkt. 61, p. 1, ¶ 1]. Unit 1 of the Springerville Plant was completed in 1985, and  
23 Unit 2 of the Springerville Plant was completed in 1990. [Id., p. 2, ¶ 4].

24           Plaintiff has existed since 1985. [Dkt. 76, p. 2, ¶ 6]. In addition to serving on  
25 Plaintiff’s board of trustees since 1986 [Dkt. 61, p. 5, ¶ 25], John Schaefer (“Schaefer”)  
26 served on Defendant’s board of directors from May of 1983 until September of 1991. [Id.,  
27 p. 5, ¶ 26]. In 1989, Schaefer also served as Defendant’s chairman of the board. [Id.].  
28

1 During the period Schaefer served on Defendant's board, the construction of the  
2 Springerville Plant was often an agenda item and a regular topic of conversation. [Dkt. 61,  
3 Exh. B., pp. 12-13]. Plaintiff's members were aware of Schaefer's prior association with  
4 Defendant as early as 1990. [*Id.*, p. 25].

5 Plaintiff filed this action in 2001 [Dkt. 1], sixteen years after Unit 1 was completed  
6 and eleven years after Unit 2 was completed. The permitting, construction, and operation of  
7 the Springerville Plant was never a secret because the EPA and the Arizona Department of  
8 Environmental Quality ("ADEQ") have maintained files on these matters available for public  
9 review.<sup>1</sup> [Dkt. 61, pp. 1-2, ¶¶ 2-3; p. 5, ¶ 24].

10 Plaintiff has failed to provide an adequate explanation to preclude a finding of  
11 unreasonable delay. "This is not a case in which [Plaintiff] pursued an alternative avenue of  
12 relief, or one in which the legal basis for relief was not then recognized[.] Nor is this a  
13 situation in which diligence otherwise was demonstrated." *Apache*, 21 F.3d at 909 (citations  
14 omitted). Indeed, Plaintiff has acknowledged it had "no particular reason" for waiting more  
15 than a decade to pursue this matter. [Dkt. 76, p. 4, ¶ 20].

#### 16 **B. Prejudice**

17 To determine whether Defendant will suffer undue prejudice, the Court must consider  
18 whether the harm sought to be prevented is now irreversible or is reversible only at undue  
19 cost to the relevant project. *Apache*, 21 F.3d at 912. The project in question, two large coal-  
20 fired power plants, has already been completed and operating for at least eleven years. If the  
21 relief Plaintiff seeks is granted, Defendant would have to replace the existing emission  
22 control equipment that Defendant has already purchased with different emission control  
23 equipment that may cost as much as \$300,000,000. [Dkt. 61, Exh. A, p. 3, ¶ 7]. This figure  
24 excludes additional expenses that Defendant may incur if the Springerville Plant is forced  
25 to stop operating while the new emission control equipment is installed.

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27 <sup>1</sup> Although Plaintiff disputes Defendant kept the EPA or the ADEQ informed of its  
28 progress [Dkt. 76, p. 2, ¶ 3], Plaintiff offers nothing more than this base assertion to refute  
Defendant's submitted declaration [Dkt. 61, Exh. A].

1 Furthermore, Plaintiff is seeking civil penalties amounting to \$25,000 to \$27,500 per  
2 day to accrue from the date Plaintiff alleges Defendant's permit was invalid. [Dkt. 28, p. 17].  
3 Plaintiff's delay in bringing suit has only served to excessively increase those potential  
4 penalties.

5 The harms Plaintiff seeks to prevent are only reversible at undue cost to the  
6 Springerville Plant project, and Defendant has therefore established it will suffer prejudice  
7 as a result of Plaintiff's unreasonable delay.

8 **C. Vindicate the Public Interest**

9 Although laches should be invoked sparingly in cases intended to vindicate the public  
10 interest, the Court finds the facts in this matter warrant the defense. The Court will therefore  
11 grant Defendant's Motion for Summary Judgment on the Basis of Laches.

12 Because the Court will dismiss this action, the Court need not consider the remaining  
13 pending motions.

14 Accordingly,

15 **IT IS ORDERED** that Plaintiff's Motion for Partial Summary Judgment on the Issue  
16 of Standing [Dkt. 55] is **GRANTED**.

17 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment on  
18 the Basis of Laches [Dkt. 60] is **GRANTED**.

19 **IT IS FURTHER ORDERED** that this case is **DISMISSED**, and the Clerk of Court  
20 shall enter judgment in favor of Defendant and against Plaintiff.

21 DATED this 3 day of March, 2003.

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Earl H. Carroll  
25 United States District Judge  
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